WASHINGTON
LEGISLATIVE OFFICE

October 16, 2007

ACLU Opposes the RESTORE Act Because it Fails to Resolve Constitutional Concerns Regarding the National Security Agency's Surveillance of Americans' E-mails and Phone Calls

Dear Representative,

On behalf of the American Civil Liberties Union ("ACLU"), America's oldest and largest civil liberties union, its 53 affiliates and hundreds of thousands of Members, we write to share our analysis of H.R. 3773, the RESTORE Act. Because the RESTORE Act fails to resolve numerous constitutional infirmities enacted in the Protect America Act, Pub. L. 110-55 (2007), the ACLU opposes the RESTORE Act. The ACLU further urges Members of the House of Representatives to insist that any final legislation that is enacted to replace the Protect America Act bring surveillance conducted under the Foreign Intelligence Surveillance Act of 1978 ("FISA") in line with both the letter and the spirit of the Fourth Amendment to the United States Constitution. In addition to its constitutional infirmities, the RESTORE Act fails to adequately protect the privacy of Americans' communications.

While the RESTORE Act is better than the Protect America Act, the RESTORE Act falls below a standard justifying Member support in several key areas as discussed in detail below. First, the RESTORE Act legitimizes mass warrants that are not directed at specific individuals in violation of the Fourth Amendment to the constitution. Second, the RESTORE Act explicitly permits the issuance of warrants without requiring the government to describe with particularity the facility that is to be searched, in violation of the Fourth Amendment to the Constitution. Third, while the RESTORE Act does provide some role for the Foreign Intelligence Surveillance Court ("FISC") to review surveillance by the National Security Agency ("NSA"), the Act fails to provide sufficient legal standards for the FISC to judge the appropriateness, suitability, legality and constitutionality of the procedures the NSA will use to undertake that surveillance and how it will handle the communications acquired. Fourth, the RESTORE Act fails to require specific procedures to ensure that the privacy of innocent Americans' e-mails and phone calls is protected by not demanding the sequestration and/or destruction of inadvertently acquired communications of U.S. persons. Fifth, the RESTORE Act creates a potentially enormous loophole that could be exploited to allow the government to gather virtually all communications

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

– including those of U.S. citizens – without obtaining any warrant whatsoever.

1) The RESTORE Act Enacts Unconstitutional Bucket Warrants

The RESTORE Act is deeply flawed in that it legitimizes unconstitutional mass "warrants", first permitted by passage of the Protect America Act on August 5, 2007, which are not really warrants at all because they are not directed at a particular individual. Called baskets, buckets or blankets, the new warrants created by the Protect America Act, and maintained in modified form by the RESTORE Act are most commonly known as "program" or "general" warrants that violating the Fourth Amendment to the United States Constitution. The Fourth Amendment protects against unreasonable searches and seizures. The Amendment states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, the Fourth Amendment requires that before the government may obtain a warrant for a search it must identify with particularity the person or persons who are the target of the search. By authorizing the government to obtain bucket warrants in § 3, the RESTORE Act fails to require that the warrants sought satisfy this requirement. Thus, the RESTORE Act arguably would permit the NSA to wiretap substantial numbers of unknown persons. The likely consequence of this is that U.S. persons, living, working or traveling abroad, will have their communications wrongly swept up into the dragnet of communications obtained under any non-individualized bucket warrants. This raises the specter that the NSA will pass along those conversations and that the information wrongly obtained could be misused even though the communications do not contain any foreign intelligence information.

2) The RESTORE Act Explicitly Authorizes Warrants Without Particularized Descriptions of the Places to be Searched

The RESTORE Act is likely unconstitutional in that it is directly in opposition to the plain language requirement of the Fourth Amendment to the Constitution that any oath or affirmation accompanying a request for a warrant "particularly describe[e] the place to be searched." Section 3 of the RESTORE Act proposes amendments to FISA § 105B(c) to permit warrant applications in a section entitled "Specific Place Not Required." That

proposed section states that "[a]n application under subsection (a) [of the RESTORE Act] is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be targeted." RESTORE Act, § 3. This language is in direct conflict with the Constitution.

The impact of this unconstitutional grant of authority is that the NSA is permitted to listen to and gather communications without identifying the target phone numbers, e-mails or locations that will be tapped. When such broad authority is granted, mistakes will surely follow and the NSA will undoubtedly obtain communications from phone numbers and e-mails that have no relationship to international terrorism or foreign relations. The result that follows will be that innocent U.S. persons' communications will be scooped up because the NSA has not been forced to precisely target its vast surveillance capabilities. As a result, the NSA will gather extraordinary numbers of communications that are wholly irrelevant to NSA's mission and that drown the intelligence community in useless information.

Congress should strike this provision from the Act.

3) The RESTORE Act Fails to Provide the FISC Legal Standards to Judge the Secret Acquisition Procedures

The court review provided by the RESTORE Act does not create a mechanism in the form of statutory guidance so that the FISC can stand as an independent check against government abuse of surveillance authority. While the RESTORE Act takes important steps to reinvigorate the FISC as a check on future executive branch abuse of FISA, the RESTORE Act does not provide the FISC judges with specific legal standards for the FISC to judge the appropriateness, suitability, legality and constitutionality of the procedures the NSA will use to acquire, collect, warehouse, review, and disseminate communications intercepted. Section 3(c) of the RESTORE Act simply requires that the Director of National Intelligence and the Attorney General will develop procedures in secret, and then, submit those procedures to the FISC as part of the basket warrant application. But this review is virtually meaningless because the RESTORE Act does not set forth criteria to allow the FISC judges to compare those procedures with in order to judge there lawfulness. The result is that judges will likely defer to the government lawyers who are petitioning in secret for this authority. Further, no third party is allowed to present and challenge the suitability, legality or constitutionality of the secret procedures, thus judges will not be given a full exposition of the potential pitfalls of the approach taken by the government.

The problems raised by this lack of statutory legal standards are predictable: the privacy of innocent U.S. persons' communications will be violated. Although warrant targets are required to be people the government reasonably believes to be overseas, it is a certainty that the communications

of U.S. persons will be inadvertently swept up in the broad surveillance regime. Thus, the legality and constitutionality of the minimization procedures, i.e., the procedures governing what the NSA must do when it encounters a U.S. person as one party to a communication – must be carefully scrutinized by the FISC. But, the RESTORE Act does not give the FISC a meaningful role in reviewing the procedures the government will use when it encounters a U.S. persons' communications. Without specific statutory guidance the FISC judges are left to their own devices to review minimization procedures. The result is that Congress cannot have confidence that the minimization procedures – even if deemed "reasonable" by the FISC – will properly protect privacy. Worse still, the minimization procedures are not, and have never been, made public. No one, save a few Intelligence Committee members, know how well minimization works or how it is actually implemented. Something so fundamental as whether the government can listen to our phone calls or read our emails should not be left to be decided in secret by a handful of people.

FISA, as amended, is largely silent as to statutory requirements providing guidance or limitations for those minimization procedures. The few provisions in FISA discussing minimization do not require that U.S. persons' information be destroyed – except in the narrow circumstance of wiretapping an embassy, which absolutely does not apply to this program.

In the end, the RESTORE Act provides only a limited role for the FISC. Essentially, the only role for the court is to negotiate secret rules that do not even require that American information be destroyed, or ultimately prevent American information from being used or disseminated. Compounding the problem, the RESTORE Act does not provide explicit authority for the FISC to modify the orders or the minimization procedures if it finds a problem during the quarterly review mandated by the RESTORE Act.

4) The RESTORE Act Fails to Require the Sequestration or Destruction of Inadvertently Acquired U.S. Persons' Communications

The RESTORE Act fails to mandate that when the communications of U.S. persons are inadvertently intercepted that the NSA minimize in a meaningful way that communication, either by requiring the NSA to sequester or destroy that conversation. It is a certainty that the expanded surveillance regime enacted in the Protect America Act and reduced in scope, but left intact by the RESTORE Act, will lead to substantially more "inadvertent intercepts" or "inadvertent overhears" by the NSA of U.S. persons' communications. Thus, the ACLU believes that Congress must insist on a more robust regime forcing the NSA to properly protect the privacy and constitutional rights of U.S. persons' communications that are

wrongly gathered. The RESTORE Act does not respond meaningfully to this eventuality. Instead, as with the Protect America Act, the NSA is allowed to benefit from the windfall effect by keeping and reviewing any U.S. communicants' conversations it "accidentally" acquires while "targeting" people reasonably believed to be overseas who may discuss foreign intelligence information. At a certain point, Congress must ask: Given the huge quantum of U.S. persons' communications that will undoubtedly be obtained under this new scheme, is not the real target of the Protect America Act and bucket warrants in fact the communications of U.S. persons that the NSA could not have acquired prior to the passage of the Protect America Act? If so, the RESTORE Act fails to resolve this mistargeting of U.S. persons' communications by eliminating the ability of the NSA to use such windfall intercepts with impunity. Congress should demand real minimization procedures for U.S. communications.

5) The RESTORE Act Creates a Potential Loophole that Obviates the Protections Created by the Entire Act

Finally, the very first section of the RESTORE Act, creates a potentially enormous loophole that could be exploited by an aggressive NSA to obviate even the modest privacy protections that would be achieved through passage of the RESTORE Act. The loophole in proposed § 105A(a) relates to the proposed authority to allow the President to conduct surveillance for gathering foreign intelligence that relates to the conduct of foreign affairs, as defined in FISA § 101(e)(2)(B). The RESTORE Act would potentially authorize interceptions of communications likely to yield "foreign affairs" information without requiring the government to obtain a warrant so long as the target is reasonably believed to be a non-US person outside the United States, regardless of whether that person communicates with U.S. persons in the United States. Proposed § 105A(b) regulates electronic surveillance programs for foreign intelligence purposes defined under FISA §§101(e)(1) and 101(e)(2)(A), but would not regulate surveillance conducted to acquire foreign affairs communications as defined in § 101(e)(2)(B). Indeed the applications under proposed § 105B would require the Attorney General to certify that the basket surveillance requests to the court were for §§ 101(e)(1) or 101(e)(2), thus, even should the Attorney General wish to obtain a warrant for 101(e)(2)(B) surveillance he would have no authority to do so.

Consequently, if proposed § 105A of the RESTORE Act were enacted this means as long as the President says he is conducting surveillance for purposes under 101(e)(2)(B) none of the bills other protections kick in, and he can intercept all the communications of US persons with no oversight from Congress or the FISC.

Summary and Conclusion: The RESTORE Act Perpetuates Several Constitutional and Legal Infirmities First Created by the Protect America Act

The RESTORE Act falls below standards meriting its support.

The Fourth Amendment has several requirements before a search or seizure is constitutional -- that a judge is involved, that there is probable cause, that the search or seizure is reasonable, and most important for this discussion – the things searched or seized have to be stated with particularity. The particularity requirement was written into the Fourth Amendment due to past abuses by King George III, whereby the government would issue blank warrants that allowed government officials wide discretion to rifle through personal belongings or search people, without particularized suspicion, to look for anything illegal. No description was actually given of the illegal behavior that was being investigated, because the government was on a fishing expedition. This abuse of power was no less than one of the injustices that led to the American Revolution. Statutes and even individual searches and seizures have since been held unconstitutional in the past because they violate the particularity requirement.

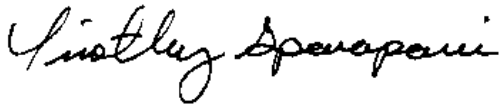
The Protect America Act and the RESTORE Act allow the government to issue these broad program warrants that state neither the targets of the search, nor the facilities that will be accessed. They do not describe what is going to be seized, and eventually used, by the government. They are virtually a blank check that require only that the surveillance be directed at people abroad, which may very well be unconstitutional. The RESTORE Act does not require individualized court orders for anything collected under the new surveillance program. The program can collect any communication as long as one leg of it is overseas, leaving open the distinct possibility – and probability – that the other leg is here in the U.S. and is an American. If Americans are swept in the new mass collection in this new general, program warrant, there is no requirement that a court actually review whether those communications are seized in compliance with the Fourth Amendment. The RESTORE Act, as currently written, allows the Attorney General to negotiate secret guidelines with the secret FISA court about how to use US information, and whether to go back to the court for an individualized warrant to access US communications. There is no requirement in the RESTORE Act that individualized warrants be issued before the government collects communications to which an American is a party. If a US phone call or email is picked up in these general warrants -- not based on any suspicion of wrongdoing, or even based on a link to terrorism -- they can be saved and used by the government without any court review.

Attempts to find a procedure that gives the government flexibility while respecting the constitutional requirement of particularity have been rejected. It is perfectly reasonable to allow program warrants to collect calls and emails among foreigners but Americans deserve, and the constitution requires, that their communications be treated differently when swept up in the new dragnet. The government should be forced to go back to court to get a particularized warrant that meets Fourth Amendment standards before it can access American communications that have been swept up in these new blanket or general warrants. Just because the program is directed at people overseas, it doesn't mean that the Fourth Amendment rights of Americans who have contact with them have been respected. There has not been a surveillance program since FISA was created that allows massive, untargeted collection of communications that will knowingly pick up US communications on US soil without any suspicion of wrongdoing. This creates novel and fundamental Fourth Amendment problems that Congress should seek to avoid instead of sanctioning.

For these reasons, the ACLU opposes the RESTORE Act, H.R. 3773.

Sincerely,

Caroline Fredrickson
Director, Washington Legislative Office



Timothy Sparapani
Senior Legislative Counsel

For further information, please contact Senior Legislative Counsel Timothy Sparapani at (202) 715-0839 or tsparapani@dcaclu.org, or Lobbying Consultant Michelle Richardson at (202) 715-0825 or mrichardson@dcaclu.org.