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**MEMORANDUM**

August 9, 1994

TO: INTERESTED PERSONS

FR: AMERICAN CIVIL LIBERTIES UNION

RE: WARRANTLESS NATIONAL SECURITY SEARCHES, S. 2056.

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The Senate Select Committee on Intelligence has reported legislation that would authorize secret warrantless physical searches for national security reasons, by applying the provisions of the Foreign Intelligence Surveillance Act (FISA) to physical searches. S. 2056, the Counterintelligence and Security Enhancements Act of 1994. The ACLU opposes this proposal. Black bag jobs were one of the worst civil liberties abuses of the cold war. Instead of now approving them, the Congress should outlaw them.

In recent testimony before the House Intelligence Committee, the Deputy Attorney General asserted that the Executive branch has inherent authority to conduct secret searches of Americans' homes and offices without a warrant, simply on the say-so of the Attorney General for national security reasons. The ACLU strongly believes that there is no national security exception to the Fourth Amendment: the Supreme Court has never approved such an exception and no court has ever approved a warrantless secret search of a person's home in the United States for national security reasons.

Nevertheless, the Attorney General authorized such a warrantless search of Aldrich Ames' house and papers, a few months before he was arrested. Had Ames gone to trial the government would have sought to use evidence seized in that

<sup>1</sup> Only one court has faced the question of warrantless physical searches for national security reasons and that case did not involve a search of a home -- where the expectation of privacy is greatest -- but of packages given to a courier for overseas delivery, where there was a much reduced expectation of privacy. United States v. Truong, 629 F.2d 908 (4th Cir. 1980). Even then the court held unconstitutional the search conducted after the investigation became criminal. The case law concerning electronic surveillance is not applicable to physical searches.

search against him and his attorney has said that he would have challenged its legality.

In the absence of any legal authority for such searches, the administration now supports a proposal to apply FISA procedures, which govern electronic surveillance, to physical searches. But this proposal, instead of providing greater protection to constitutional rights, will likely lead to significantly more unconstitutional searches by giving a legislative seal of approval to the practice. Although the proposal would add a court order to the process, the searches would still be secret, with no meaningful judicial review, and would still be conducted based on the current executive branch standards which are constitutionally inadequate. We believe that enacting this proposal would do even more damage to the Constitution than leaving the status quo.

The ACLU reluctantly accepted FISA's weakened constitutional standards for electronic searches because of the government's widespread practice of warrantless electronic surveillance and many courts' creation of a national security exception for electronic searches. But the Supreme Court has never hinted at any such exception for physical searches.<sup>2</sup> We firmly believe that FISA's weakened standards should not be applied to searches of the home and private papers, which are at the core of the Fourth Amendment's protection.

The current proposal is unconstitutional for the following reasons:

-- It would authorize government agents to break into and search the houses of Americans, and photograph their private papers, without a warrant, without knocking before entering, and without ever informing Americans that their homes and papers have been searched. While providing for court orders in advance of such searches, such orders would not satisfy Fourth Amendment warrant requirements because they do not notify the suspect of an intended search.<sup>3</sup>

-- It would prevent any meaningful judicial review of any such searches. Judicial review, an essential check on abuses, is only meaningful when the target of the search can challenge it in a public, adversarial proceeding. Under this bill, most individuals would never even know the government had seized copies of their private papers. Even individuals who learn that they were searched -- because criminal charges are brought -- would be denied an adequate opportunity to challenge the legality

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<sup>2</sup> To the contrary, it recognized that the Fourth Amendment applied even to searches of Soviet spies. See Abel v. United States, 362 U.S. 217 (1960).

<sup>3</sup> See Katz v. United States, 389 U.S. at 354 n.15.

of the search in court. Under FISA procedures, the Attorney General may require that a court review all search materials ex parte and in camera, and in practice the Attorney General always insists on such proceedings. 50 U.S.C. § 1806(f).

-- The probable cause standard in the bill, which is the same standard currently used by the Executive Branch when conducting warrantless searches, is constitutionally inadequate because it does not require probable cause of criminal activity and that specific evidence of crime is being sought.<sup>4</sup>

-- The probable cause standard would allow searches of individuals deemed agents of a foreign power based solely upon lawful political advocacy in favor of certain causes or groups in violation of the First and Fourth Amendments.

-- The bill would permit the government to avoid Fourth Amendment requirements even when conducting searches of individuals who are targets of criminal investigations simply by asserting a "foreign intelligence" purpose, in addition to a law enforcement purpose. It permits the use of such searches in investigations of crimes much less serious than espionage, for example, in cases involving violations of the export control laws or industrial espionage even when the information at issue is not even classified.<sup>5</sup>

In short, judicial approval in secret of secret searches based on an unconstitutional probable cause standard does not begin to cure the constitutional problems in the current practice. The Framers determined that individual rights should not be sacrificed to considerations of expediency. Especially now that the threats posed by the Cold War are gone, collecting foreign intelligence information must no longer be used as a justification for abridging fundamental rights.

For further information, please call Kate Martin at 202-675-2327.

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<sup>4</sup> See Hearings before the Subcommittee on Intelligence and the rights of Americans, of the Senate Select Committee on Intelligence, on S. 1566, Foreign Intelligence Surveillance Act of 1978, July 19, 1977 (pp. 6-11).

<sup>5</sup> There are other constitutional defects: the bill would authorize dissemination of information seized from U.S. citizens to foreign intelligence services, when the citizens would not even know of the seizure; and it makes an unconstitutional distinction between U.S. and non-U.S. persons, when the Fourth Amendment applies equally to all persons within the United States.