

May 23, 2006

The Honorable Arlen Specter
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Democrat
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

As the Committee on Judiciary continues its consideration of legislation regarding warrantless electronic surveillance, I write to express the further views of the American Bar Association on this issue.

The Administration's program of electronic surveillance raises very serious questions about its constitutionality under the Fourth Amendment and other sections of the Constitution. Therefore, the ABA renews its request that the Committee delay its consideration of legislation altering our intelligence laws until it has completed a full investigation into the scope of surveillance activities being conducted by the government and any legal barriers that law enforcement has encountered in undertaking these efforts. There are so many unanswered questions remaining that it would be difficult if not impossible to craft appropriate legislation. The recent revelations of a massive NSA database of call-detail information for millions of Americans is the most recent example of how much the Congress does not know about the monitoring of innocent Americans for anti-terrorism purposes.

The American Bar Association appreciates the leadership you have shown in trying to draw more attention to these issues, but the Committee still has work to do in establishing a full picture of the nature and extent of warrantless surveillance being conducted in this country. As you indicated at the May 11th meeting of the Committee, Mr. Chairman, "We're really flying blind on the subject, and that's not a good way to approach the Fourth Amendment and the constitutional issues involving privacy." We support your continuing efforts to establish Congressional oversight in this area and urge you to delay consideration of the pending bills until such oversight can be achieved.

Like you, the members of the ABA want to ensure that our government has the anti-terrorism intelligence-gathering powers that it needs. If the Congress conducts a thorough inquiry and makes an informed determination that the rules set forth in laws like the Foreign Intelligence Surveillance Act ("FISA") need to be revised to enhance our enforcement abilities, then it should promptly do so in a manner that comports with constitutional requirements. The Bush Administration has claimed that the current FISA structure lacks sufficient flexibility to deal with today's foreign intelligence efforts. If lawmakers who are educated about these issues explore this question and determine, for example, that it would be beneficial to change the emergency exception period in FISA from 72 hours to 7 days, then that could be a reasonable step to take. However, the Congress, in fulfilling its constitutional responsibility to oversee the actions of the Executive Branch, should not act on legislation until it is in a position to determine whether such legislation is necessary and appropriate.

Without the benefit of such further inquiry, the ABA remains concerned about the May 11th substitute version of S. 2453, the National Security Surveillance Act. The substitute abandons the concept that the Administration seek a mandatory review of the legality of its electronic surveillance activities from the Foreign Intelligence Surveillance Court and instead shifts that burden to individual plaintiffs. The critical role established by Congress in FISA for judicial review of wiretaps is dramatically undermined by relying upon a private party being able to establish standing in a matter involving secret surveillance and to overcome the potential obstacles to having the case heard by the Court.

Furthermore, the ABA is troubled by the mandatory transfer to the Foreign Intelligence Court of Review of all such cases questioning the legality of electronic surveillance programs. We appreciate the intent behind the provision to ensure that a review of the Administration's activities occurs even if the Administration fails to cooperate. However, the potential effects of such a mandatory transfer in all cases is that the legal questions at issue will be removed from a public forum and addressed in a secret proceeding, and the confidence of the citizenry in the legality of the government's actions will be seriously compromised.

Under the substitute, if a plaintiff is able to overcome potential procedural barriers by the Administration and gain standing in the Foreign Intelligence Court of Review, the Court then has jurisdiction to issue an order that authorizes an electronic surveillance *program* and allows for the perpetual renewal of such a program so long as the court determines it to be reasonable. While we appreciate the efforts to bring the judiciary into the process, allowing the Court to issue "program-wide" approval appears to allow for the creation of a general warrant for foreign intelligence purposes. This wholesale program ratification would be difficult to square with the particularity requirements of the Fourth Amendment that necessitate that any government surveillance be reasonable, supported by warrants issued by courts, and based upon specific probable cause in each case.

The ABA is also deeply concerned about Title VIII of the legislation, which repeals the exclusivity provisions of FISA. FISA established a balance between the powers of the

three branches of government to create a constitutionally sound system for foreign intelligence gathering. It also ensured the protection of privacy interests in response to revelations of abusive warrantless electronic surveillance by the Executive Branch. Inserting language stating that "nothing in this Act shall be construed to limit the constitutional authority of the President" to conduct foreign intelligence surveillance would upset this balance, essentially giving the President the freedom to ignore the existing FISA structure. Additionally, the substitute exempts from offense warrantless electronic surveillance conducted outside the FISA process under Executive constitutional authority. By making these provisions retroactive to the enactment of FISA, Congress would be effectively ratifying the Administration's surveillance program. Collectively, these changes would largely eliminate the checks on Executive power currently provided by FISA.

The ABA applauds your efforts to bring the full memberships of the House and Senate Intelligence and Judiciary Committees to the table on these issues. We stand ready to work with you in raising public awareness about warrantless electronic surveillance and to work with you to craft a narrowly tailored solution to any policy issues that the Congress uncovers in its oversight of these matters.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Michael S. Greco". The signature is written in a cursive, flowing style.

Michael S. Greco

cc: Members of the U.S. Senate Committee on Judiciary