

June 8, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Democratic Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

As the Judiciary Committee proceeds with its consideration of legislation regarding electronic surveillance, I write to express the views of the American Bar Association (“ABA”) with respect to S. 3001, the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006.

Over the past several months, the ABA has urged your Committee to conduct a more thorough inquiry into the nature and extent of electronic surveillance being conducted outside of the process set forth in the Foreign Intelligence Surveillance Act (“FISA”). Although your Committee has attempted to gather more information on this topic, it appears that the Administration has not been forthcoming in providing you with additional details of its intelligence activities. We continue to believe that comprehensive oversight is essential to ensure that the appropriate checks and balances on executive power are in place. However, we also appreciate the Committee’s determination that, despite having imperfect information, it is better to move forward with legislation to bring the domestic electronic surveillance program into compliance with FISA rather than to stand by and allow the status quo of unsupervised surveillance to continue.

Chairman Specter, the ABA commends you and Senator Dianne Feinstein for introducing S. 3001. We believe that the involvement of Senator Feinstein, who as a member of the Intelligence Committee has been more fully briefed on the operational aspects of the classified program, has been highly beneficial. We particularly welcome the provisions in the bill that reiterate that FISA and Title III of the criminal code are the exclusive means for conducting electronic surveillance and that prohibit the use of funds for surveillance being conducted outside of this framework. We also support the clarification

in the bill that any future law authorizing electronic surveillance outside the FISA process must specifically amend or reference FISA.

The legislation also attempts to address the Administration's need for additional flexibility to pursue intelligence-gathering activities by providing additional resources and streamlining the current FISA procedures. Specifically, the legislation would expand the current emergency exceptions to FISA by extending the period for emergency authorization of surveillance from 72 hours to 7 days. It also augments the 15-day wartime exception to include incidents of Congressional authorization for the use of force or a national emergency created by a terrorist attack. The legislation also allows for the initiation of electronic surveillance on an emergency basis by the FBI or NSA so long as certain procedural safeguards are met and an application to the FISA court is filed within 7 days of commencing the electronic surveillance.

The ABA commends your efforts to improve the efficiency of the current FISA process. We believe that all future electronic surveillance for foreign intelligence purposes should be conducted within the FISA framework and support your efforts to improve that process. The authorization of additional resources should enhance the effectiveness of the FISA process, while maintaining its important constitutional safeguards. The legislation also requires that the Attorney General review the current FISA procedures, and in consultation with the FISA Court, identify any undue impediments in the FISA application structure and address any recommendations for potential new procedures. We believe that this process is a thoughtful attempt to uncover more information about how the FISA process is working and if there are any barriers to its success.

We continue to believe that the Committee would benefit significantly from additional information about current surveillance practices before acting on any policy proposals. But if action must be taken immediately, we would support the narrowly-tailored provisions included in S. 3001 to modernize FISA procedures.

Sincerely,

A handwritten signature in black ink that reads "Michael S. Greco". The signature is written in a cursive style with a large, sweeping initial "M".

Michael S. Greco

cc: Members of the Senate Committee on the Judiciary