

June 19, 2006

The Honorable Jane Harman
Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Harman and Ranking Member Conyers:

I write on behalf of the American Bar Association (the "ABA") to express our appreciation to you for introducing H.R. 5371, the "Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act" (the "LISTEN Act") and to voice our support for the legislation.

The ABA is deeply troubled by the revelations that our government is conducting domestic electronic surveillance outside of the process set forth in the Foreign Intelligence Surveillance Act ("FISA"). In response, I appointed the Task Force on Domestic Surveillance in the Fight Against Terrorism to explore the very difficult constitutional questions raised by unsupervised domestic surveillance. The Task Force is composed of a bipartisan group of distinguished lawyers that include a former Director of the Federal Bureau of Investigation, a former General Counsel of the National Security Agency and the Central Intelligence Agency, the National Institute of Military Justice General Counsel, and others with deep knowledge of national security law. Our position on these issues is based upon the unanimous report and unanimous expert recommendations of the Task Force that were adopted by a nearly unanimous voice vote of the ABA's 550-member House of Delegates.

The ABA believes that it is essential for Congress to undertake a thorough inquiry into the nature and extent of the warrantless domestic electronic surveillance conducted by the Bush Administration before acting to fundamentally alter our intelligence laws. Congress can only make responsible policy determinations once it knows what surveillance programs are in place, why they are necessary, and why the current statute is insufficient to accommodate them. We believe that the LISTEN Act provides the Congress with the tools that it needs to achieve an improved understanding of these issues.

The LISTEN Act reinforces that FISA and Title III of the criminal code are the exclusive means for authorizing electronic surveillance. The ABA believes that any future domestic surveillance for foreign intelligence purposes must be conducted within the framework of FISA, which has successfully balanced the needs of national security and constitutional freedoms since 1978. In enacting FISA, Congress was concerned not only with violations of the Fourth Amendment, but the chilling effect that abuses of electronic surveillance by the Executive Branch had on free speech and association. Therefore, we support the affirmation in H.R. 5371 of the exclusivity provisions to ensure the continued relevance of the essential safeguards of the existing FISA structure.

Furthermore, the ABA welcomes the express statement in the LISTEN Act that the Authorization for Use of Military Force of September 18, 2001 (P.L. 107-40) did not provide a statutory exception to the FISA requirements. We believe that any such exception can only be authorized through affirmative and explicit action by Congress.

The enhanced reporting requirements in the LISTEN Act could be extremely beneficial to Congress. The legislation requires the Administration to report to the full House and Senate Intelligence and Judiciary Committees if it encounters difficulty in complying with FISA in its pursuit of foreign intelligence objectives through electronic surveillance. The information provided by comprehensive reporting will facilitate the oversight responsibility of Congress and will educate Members about any potential need for modernization of the law to meet existing challenges.

The ABA urges the Congress to conduct a thorough review of the intelligence oversight process. We believe that adoption of the LISTEN Act would provide the Congress with valuable assistance in undertaking those efforts and supply the information necessary to consider whether any future amendments to FISA would be appropriate to enable the government to respond to such threats in a manner consistent with the Fourth Amendment.

We commend you for your leadership on this issue.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael S. Greco". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael S. Greco

cc: All members of the House Permanent Select Committee on Intelligence and the House Committee on the Judiciary.