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September 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the 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 & Senator Leahy:

As the Senate Committee on the Judiciary continues its consideration of electronic surveillance legislation, the American Bar Association wishes to express its views on the August 3rd amended version of the Chairman's bill, S. 2453.

First, the judicial review contemplated by the legislation would allow the Foreign Intelligence Surveillance Court to authorize an entire electronic surveillance *program* rather than approve surveillance through individual warrant applications. It also allows for the perpetual renewal of the program so long as the court determines it to be reasonable. While the ABA believes that it is essential to restore judicial review of surveillance activities, this is a significant departure from the FISA statutory framework and the particularity requirements of the Fourth Amendment, which require that any government surveillance be reasonable, that individual warrants be issued by courts, and that the requests be based upon specific probable cause in each case.

Second, the legislation effectively repeals the exclusivity provisions of FISA. In enacting FISA, Congress demonstrated its concern not only with violations of the Fourth Amendment, but with the chilling effect that abuses of electronic surveillance by the Executive Branch have on free speech and association. By providing that "nothing in this Act shall be construed to limit the constitutional authority of the President," the legislation would significantly alter the balance of power between the branches previously established by FISA and sanction surveillance conducted outside its protective framework.

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Third, the legislation requires the transfer to the Foreign Intelligence Surveillance Court of Review of all cases challenging the legality of classified communications or intelligence activities, including electronic surveillance, upon an affidavit by the Attorney General. The potential effect of a broad mandatory transfer of such pending cases is that the legal questions at issue will be removed from a public forum and addressed in a secret proceeding. The ABA believes that this secrecy would seriously compromise the confidence of citizens in the independence of judicial review and the legality of the government's actions.

While the ABA appreciates the leadership that you both have shown in keeping these issues at the forefront of national attention, we are concerned that, if adopted, this legislation would legitimize surveillance outside of FISA without any demonstrated justification. There are Members of Congress who have been fully briefed on the operational details of the program that feel that the scope of the changes envisioned by this legislation has not yet been justified.

Before acting on this legislation, we urge you to thoughtfully consider the more narrowly-tailored approach to updating our electronic surveillance laws that is reflected in S. 3001, the previously-introduced Specter-Feinstein legislation.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Karen J. Mathis".

Karen J. Mathis

cc: Members of the Senate Committee on the Judiciary