March 5, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our concerns regarding H.R. 338, the "Federal Agency Protection of Privacy Act of 2004." As Chair of the ABA Section of Administrative Law and Regulatory Practice, I have been authorized to express the ABA’s views on this important matter.

H.R. 338 would require federal agencies to formally consider the impact that new regulations will have on the privacy of individuals. Among other things, the bill would: (1) require agencies to include an initial privacy impact analysis with proposed regulations; (2) require agencies, after an opportunity for public comment, to include a final privacy impact analysis that describes the steps that were taken to minimize the significant privacy impact of proposed regulations and that justifies the alternative chosen by the agency with respect to privacy; (3) permit judicial review of the adequacy of an agency’s final privacy impact analysis; and (4) require agencies to periodically review rules that have either a significant privacy impact on individuals or a privacy impact on a significant number of individuals.

The ABA certainly agrees that the American public should be protected from unjustified or unintended invasions of privacy by the federal government through legislative enactments, executive orders, regulatory action and other appropriate measures. While we applaud the purpose of this bill, we are writing to express our opposition to H.R. 338 because we do not believe that the need for rulemaking privacy impact analyses has been demonstrated or that imposing such a requirement would, on balance, prove useful in protecting privacy rights.

In February 1992, the ABA House of Delegates adopted a formal policy position concerning rulemaking impact analyses, and attached for your consideration is a copy of the ABA’s resolution and report on this issue. (The resolution expresses the official policy of the Association; the accompanying report is included for
information purposes only.) In adopting this policy, the ABA urged the President and Congress
to: exercise restraint in requiring rulemaking impact analyses; assess the usefulness of existing
and planned analyses; and ensure agencies’ adherence to recommendations of the ABA and the
Administrative Conference of the United States regarding such impact analyses requirements.

The ABA adopted this policy in an effort to address the virtual explosion in analytical
requirements that have been imposed on the rulemaking process in recent years and in the belief
that too many such requirements detract from the seriousness with which any requirement is
taken. In our view, before establishing a new regulatory impact analysis, the President and
Congress should carefully assess whether the proposed new analytical requirement would benefit
the public by improving the rulemaking process.

The ABA does not believe that a privacy impact analysis would meet this test for several
reasons. First, requiring an agency to undertake a privacy impact analysis does nothing, in and
of itself, to protect the public from unjustified or unintended invasions of privacy by the federal
government. Second, a general requirement to conduct a privacy impact analysis would appear
to sweep within its ambit the overwhelming majority of rules that do not have any impact on
privacy. Examples of such rules include federal tire safety standards, EPA rules establishing
limits on toxic substances, FDA rules for the approval of prescription drugs, and Commerce
Department export control regulations, to name just a few. Third, and perhaps most important,
there does not appear to be a widespread or persistent pattern of agency regulations unjustifiably
or unintentionally invading privacy. Thus, a requirement for a privacy impact analysis could
result in make-work for most agencies with little benefit to the rulemaking process or the
public’s privacy.

The ABA raised these same concerns in its May 7, 2002 letter to the House Judiciary
Subcommittee on Commercial and Administrative Law regarding similar legislation, H.R. 4561.
Since that time, Congress passed legislation known as the “E-Government Act of 2002,” P.L.
107-347, which includes a requirement for Privacy Impact Assessments when an agency either
uses information technology to gather personally identifiable information or obtains information
technology that collects, retains, or disseminates personally identifiable information. See Section
208 (44 U.S.C. 3501 note). Restricting a requirement for such analyses to situations such as
these, where the potential threat to privacy is particularly critical, may be an appropriate step.
With that step taken, however, the need for new, additional privacy impact analyses under H.R.
338 is even further reduced.

Federal government action that inadvertently or unnecessarily invades privacy should not be
tolerated. However, the ABA is not convinced that sweeping legislation like H.R. 338 is the
appropriate vehicle for addressing this issue. We therefore urge you to move cautiously and
engage in additional evaluation and deliberation before taking any further action on this
legislation. We also stand ready to work with you to craft legislation directed at specific,
identified problems of the federal government inappropriately violating the privacy of any
individual.
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Thank you for considering the views of the ABA on this important issue. If you would like to
discuss the ABA’s views in greater detail, please feel free to contact me at 503/768-6606 or the
ABA’s legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

William Funk

attachment

cc: All members of the House Judiciary Committee (w/attachment)