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Defending Liberty
Pursuing Justice

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RE: Conference on H.R. 3199

Dear Conferee:

On behalf of the American Bar Association, I write to direct your attention to provisions of the House- and Senate-passed versions of H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005 that are of concern to the ABA, and to urge consideration of our concerns during your efforts to reconcile the two versions of the bill.

Standard of Proof in Criminal Cases

The ABA strongly opposes the provision approved as an amendment to the House reauthorization bill that would allow federal prosecutors to nullify or disregard a split or hung jury, and that would provide prosecutors a "second chance" jury if they fail to gain a unanimous verdict from the first. We believe that this provision would undermine a bedrock principle of the American criminal justice system-- the requirement that guilt be proved beyond a reasonable doubt.

Current law already requires that jurors in capital cases be “death-qualified,” that jurors must not be so opposed to the imposition of the death penalty that they would refuse to impose it under any circumstance. The possibility of repeated attempts to obtain death sentences from successive "death-qualified" juries would heighten to an unreasonable degree the advantages that the state already has. We urge rejection of this provision.

Except for opposing the imposition of the death penalty on the mentally retarded, and on individuals who committed their crimes while juveniles, the Association has no policy position on capital punishment. The ABA has long advocated, however, that a unanimous decision should be required in all criminal cases heard by a jury. We support the traditional principle that unanimity is the practical expression of the concept of proof beyond a reasonable doubt. Unanimity and proof beyond a reasonable doubt are required under current law. Where one or more jurors vote not to impose the death penalty upon a conviction, guilt may have been proven, but not the predicates that must be met to impose the death penalty.

Number of Jurors in Capital Cases

The ABA also urges rejection of the provision in the House bill that would permit the court, on its own motion, to reduce the number of capital jurors to fewer than twelve. The ABA *Principles for Juries and Jury Trial*, adopted in August 2005, provide that criminal juries should be comprised of twelve persons but allow that the parties, with the approval of the court, to stipulate that the jury may consist of fewer jurors. The court may accept such a stipulation from a criminal defendant only after the court advises the defendant of (1) his or her right to trial by a full jury; and (2) the consequences of waiver. The defendant must personally waive the right to a full jury, either in writing or in open court.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to jury trial in all criminal cases in which incarceration is possible. Historically, this guarantee has required that a jury be composed of no fewer than twelve persons. Recent empirical studies have shown that twelve-member juries are superior to smaller juries; are more likely to be representative of the community; and are more likely to return verdicts in accord with community values. We believe that a jury of twelve is necessary in all serious criminal matters and that it is especially important in capital cases because of the gravity of the punishment. A lesser number should be permitted only when a defendant knowingly waives his right to be tried by a twelve-person jury, in writing or in open court.

Foreign Intelligence Surveillance Act

The ABA is concerned that there is inadequate Congressional oversight of government investigations undertaken pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801 et seq. ("FISA" or "the Act") to assure that such investigations do not violate the First, Fourth, and Fifth Amendments to the Constitution. Sections 2, 5 and 7 of the Senate bill propose enhancements to the current reporting requirements of Sections 206, 213 and 215 of the PATRIOT Act, respectively. These provisions are preferable to their House-passed counterparts and deserve to become law.

In addition, Section 10 of the Senate bill enhances Congressional oversight of FISA emergency authorities by requiring that the annual report by the Attorney General, currently required by FISA, include specific statistical information on the use of FISA physical search authority and FISA pen/register trap and trace authority. It also requires that more statistical information be reported to the Administrative Office of the United States Courts. The House version has no comparable provisions.

The ABA has urged that the PATRIOT Act be amended to clarify that the procedures adopted by the Attorney General to protect United States persons, as required by the Act, should ensure that FISA is used only when the government has a significant foreign intelligence purpose, as contemplated by the Act, and not to circumvent the Fourth Amendment. Although neither version fully accomplishes this goal, we believe that the relevant provisions in sections 2, 5, and 7 of the Senate bill strike a better balance.

Section 2 of the Senate bill, which would amend Section 206 of the PATRIOT Act, provides desirable, *albeit* limited, protections not present in the House bill for targets of roving wire taps and requires more stringent after-the-fact justification than the House bill.

Section 5 of the Senate bill, which would amend Section 213 of the PATRIOT Act, limits delay in notification of search warrants for homes or businesses to seven days, with extensions allowed thereafter, while the House bill allows for 180-day delays, with further extensions allowed. Requiring frequent and prompt review of requests for extensions will better assure that FISA is used only when the government has a significant foreign intelligence purpose.

Section 7 the Senate bill, which would amend Section 215 of the PATRIOT Act, would strengthen the standard for FISA surveillance orders by requiring the government to make a factual showing establishing reasonable grounds to believe that the records sought are not only relevant to a foreign intelligence investigation but pertain to a foreign power or an agent of a foreign power, are relevant to the activities of a suspected agent of a foreign power, or pertain to an individual in contact with, or known to, a suspected agent of a foreign power. This language, missing from the House version, would help assure that FISA is being used properly.

Sunset Provisions

The ABA supported the sunsetting of the original Act's provisions so that Congress would have the opportunity to consider, after observing their use, whether their continuation is merited. We urge the conferees to adopt the Senate's four-year sunset language with respect to the three provisions to which it would apply.

Thank you for considering the ABA's views on this very important reauthorization legislation.

Sincerely,

Michael S. Greco

NOTE:
This letter was sent to the following Conferees:
Senate: The Honorable Arlen Specter, The Honorable Orrin Hatch, The Honorable Jon Kyl, The Honorable Mike DeWine, The Honorable Jeff Session, The Honorable Patrick J. Leahy , The Honorable Edward M. Kennedy, The Honorable Jay Rockefeller, The Honorable Carl Levin.

House: The Honorable F. James Sensenbrenner, Jr., The Honorable Howard Coble, The Honorable Lamar Smith, The Honorable Elton Gallegly, The Honorable Steve Chabot, The Honorable William L. Jenkins, The Honorable John Conyers, Jr., The Honorable Howard L. Berman, The Honorable Rick Boucher, The Honorable Jerrold Nadler, The Honorable Robert C. Scott, The Honorable Peter Hoekstra, The Honorable Heather A. Wilson, The Honorable Jane Harman, The Honorable Charlie Norwood, The Honorable John Shadegg, The Honorable John D. Dingell, The Honorable Michael G. Oxley, The Honorable Spencer Bachus, The Honorable Barney Frank, The Honorable Peter T. King, The Honorable Curt Weldon, The Honorable Zoe Lofgren.