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AMERICAN BAR ASSOCIATION

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May 9, 2006

The Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy, Ranking Democrat
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Specter & Senator Leahy:

As the Senate Judiciary Committee moves forward with its consideration of legislation regarding the use of warrantless electronic surveillance on American citizens, I write to express the views of the American Bar Association on this issue.

The ABA was 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 was a bipartisan panel of distinguished lawyers that included 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. I refer to the ABA's policy below.

As your Committee considers legislation in this area, we urge you to act in a manner that reinforces public respect for our system of checks and balances and ensures that our national security is protected in a manner that is consistent with our constitutional guarantees. The ABA believes that any future domestic surveillance must be conducted within the framework of FISA, which has successfully balanced the needs of national security and constitutional freedoms since 1978. Should Congress determine after thorough investigation that FISA has not kept up with changing threats, we urge you to consider amendments that will enable the government to respond to such threats in a manner consistent with the Fourth Amendment.

Keeping these principles in mind, the ABA welcomes the efforts of Chairman Arlen Specter to retain the judicial role in overseeing electronic interceptions of domestic communications for anti-terrorism purposes. However, we believe that it is premature for the Committee to act on

legislation until Congress has carried out a thorough inquiry into the nature and extent of the warrantless domestic electronic surveillance conducted by the Bush Administration. Congress can responsibly legislate only once it knows what surveillance programs are in place, why they are necessary, and why the current statute is insufficient to accommodate them.

Without such an inquiry, neither the ABA nor the Committee can fully evaluate the merits of such pending legislation as S. 2453, the National Security Surveillance Act of 2006, introduced by Chairman Specter, or S. 2455, the Terrorist Surveillance Act of 2006, introduced by Senator DeWine. However, even without knowing what surveillance programs the proposed legislation is intended to authorize, we have a number of concerns about these bills.

Our chief concern with S. 2453, as introduced, is that it would authorize the FISA court to approve what is, in effect, a program-wide general warrant. Moreover, it would authorize the court to extend the warrant indefinitely. Such a profound departure from the case-by-case review contemplated by FISA raises significant constitutional questions. In addition, the bill could be interpreted to allow for expansive surveillance of innocent individuals who have been in inadvertent contact with persons who are legitimate targets of surveillance. It is our hope that this legislation can be modified to address these problems.

Because the ABA considers it essential that the judicial branch continue to provide an independent review of electronic surveillance of American citizens, we urge you to oppose S. 2455. S. 2455 would allow the government to conduct warrantless surveillance outside of the FISA process for up to 45 days so long as certain criteria are met. After the initial 45 days, the bill requires the government to either submit a FISA application if the evidence suffices or certify to an Intelligence subcommittee that continued warrantless surveillance is necessary to protect the United States. We are deeply concerned that S. 2455 would effectively authorize indefinite surveillance under a lower probable cause standard so long as the required certifications are duly made to the Intelligence subcommittee. While the bill increases the level of congressional oversight over electronic surveillance practices by a segment of the Intelligence Committee, it fails to contemplate any meaningful role for the judicial branch in the process if the FISA evidentiary threshold is not met. As such, it raises serious concerns about its constitutionality.

Like all our fellow citizens, the members of the American Bar Association want the government to have the powers it needs effectively to combat terrorists. However, we are deeply concerned about the electronic surveillance of Americans without the express authorization of the Congress and the independent oversight of the courts. The Congress must exert its constitutional responsibility to oversee the president's actions and ensure that those actions are subject to appropriate judicial review.

Thank you for your consideration of our views on this important and grave issue.

Sincerely,

A handwritten signature in cursive script that reads "Michael S. Greco". The signature is written in dark ink and is positioned above the printed name.

Michael S. Greco

cc: Members, Committee on the Judiciary