NEW YORK
CITY BAR

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April 18, 2006

The Honorable Pat Roberts
Chairman
U.S. Senate Select Committee
On Intelligence
109 Hart Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Chairman
U.S. Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Vice Chairman
U.S. Senate Select Committee
On Intelligence
531 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Re: S. 2453 and S. 2455

Dear Senators Roberts, Specter, Rockefeller and Leahy:

I am writing on behalf of the Association of the Bar of the City of New York to express our opposition to S. 2453, introduced by Senator Specter and S. 2455, introduced by Senator DeWine. These bills propose to amend the Foreign Intelligence Surveillance Act ("FISA") and its procedures for the review of electronic surveillance.

The Association is a professional association of over 22,000 lawyers in New York City and throughout the United States and numerous foreign countries. Founded in 1870, the Association has long been committed to protecting, preserving and promoting civil liberties, civil rights and the democratic process. The Association has long had an interest in the need to balance the fundamental interests of civil liberties with the needs of national security and to assure that concerns with national security do not unnecessarily or unduly undermine the guarantees of civil liberties. The Association also has long promoted efforts to insure the proper functioning of our system of separation of powers and checks and balances, which is so fundamental to our constitutional democracy especially where civil liberties are at stake.

INTRODUCTION

S. 2453 and S. 2455 are proposed responses to issues raised by recent disclosures that electronic surveillance ostensibly for foreign intelligence purposes has been, and still is, conducted by the National Security Administration ("NSA") without complying with procedures established by FISA. The Association agrees with the many legal scholars, members of Congress, and other commentators who maintain that the NSA surveillance program violates the unequivocal terms of FISA, because it is conducted without first seeking warrants from the FISA court, and that such departures from FISA are neither authorized by Congress nor by inherent presidential authority.

The Administration claims that FISA's procedures are not sufficiently flexible to enable the Administration to address the unique threat posed by Al Qaida. Following the 9/11 attacks, however, Congress enacted the Patriot Act and the Intelligence Authorization Act for Fiscal Year 2002 to amend FISA in response to Administration claims that it needed additional tools to protect the Nation against that threat. It is conceivable that further changes might be needed to protect national security. Such changes, however, cannot be made without full knowledge of the details of the existing NSA surveillance programs and any other surveillance programs that the government is conducting outside of FISA and a full explanation of why the Administration considers FISA inadequate. Such knowledge is necessary to assure that any changes made to FISA and any expansion of electronic surveillance authority not only be truly necessary for national security needs that are not already sufficiently served by FISA, but also provide proper safeguards for civil liberties including the judicial and congressional oversight required by our system of checks and balances.

Congress does not have such knowledge. It has not received sufficient information about the NSA surveillance program or other programs that the Administration may be implementing without court orders to adequately exercise its legislative authority. We, therefore, urge that no changes to the existing procedures for the conduct of electronic surveillance be considered until Congress has sought and obtained adequate information about existing programs and a satisfactory explanation as to why, and in what respects, FISA is not adequate to satisfy national security needs. To the extent that the need for change be demonstrated, we further urge that such changes be tightly and meticulously crafted to address demonstrated needs without unduly infringing upon civil liberties.

If, nevertheless, Congress proceeds to consider these two bills, we urge that both be rejected. We submit that both bills are seriously defective and fail to provide adequate judicial review or congressional oversight. FISA itself is a departure from traditional Fourth Amendment requirements that represents a compromise intended to balance the special needs of foreign-intelligence gathering with the Fourth Amendment's prohibition on unreasonable invasions of the privacy essential to a free and democratic society. Both the bills discussed here fail to strike that balance.

S. 2455 – The "Terrorist Surveillance Act"

This bill, introduced by Senator DeWine, effectively authorizes wide-ranging electronic surveillance of U.S. citizens for indefinite periods without any prior judicial review, at the discretion of the President and the Attorney General. It also severely limits congressional oversight. The Association vigorously opposes the enactment of this bill.

Authority to Engage in Electronic Surveillance Without Court Order

The bill authorizes electronic surveillance programs without a court order initially for up to 45 days, if the President determines that the surveillance is necessary to protect the United States, its citizens, or its interests, within or without the United States; there is probable cause to believe that one party subject to surveillance (out of the many that may be subject to the surveillance program) is an agent or member of an organization on a "Terrorist Surveillance List" established by the President, and the surveillance is reasonably designed to acquire only communications to or from the United States, where one party is in the United States and where such communications "appear to" terminate or originate outside the United States. Foreign intelligence gathering must be a "significant" (but not necessarily primary) purpose of the surveillance.

An organization will be placed on the Terrorism Surveillance List based on a determination by the President that there is a reasonable likelihood that the organization or group has engaged in, intends to engage in, or is engaged in "activities in preparation for an actual or potential act of," international terrorism against the United States, its citizens or its interests, inside or outside the United States. This enables the President to greatly expand the communications subject to surveillance without court order, even beyond those now to which the NSA surveillance program is supposedly targeted. Further, groups or organizations placed on this Terrorism Surveillance List will have no way of challenging the President's determinations or even knowing they are on the list.

Thus, during this initial 45-day period electronic surveillance programs are conducted pursuant to the unilateral, unreviewed and unreviewable determinations of the President and the Attorney General under the most sweeping and vague criteria.

Moreover, the bill permits the Attorney General to continue the program without a court order for additional 45-day periods so long as he determines that the surveillance in the prior 45 days met the criteria of the Act and that continued surveillance will result in the acquisition of foreign intelligence and the President determines that continued surveillance is necessary to protect the United States, its citizens, or its interests, inside or outside the United States. There is no limit to the number of times that a surveillance program can be renewed. Thus, the Attorney General and the President have broad discretion to continue these programs indefinitely, based on findings they unilaterally make without any judicial review.

The bill purportedly would require the Attorney General to resort to FISA's procedures for court orders where he determines that the surveillance would meet the

criteria for an application for a court order under FISA, but that determination is left entirely to the Attorney General.

In sum, the bill's provisions render judicial review highly unlikely and in any event subject entirely to the discretion of the President and Attorney General.

Congressional Oversight

The bill's provisions for congressional oversight are also illusory. They limit oversight exclusively to a proposed 7-person Subcommittee of the Senate Select Intelligence Committee and of the House Intelligence Committee. These subcommittees would receive information about the surveillance programs but would have no ability to modify, suspend, or terminate them. The only information to be submitted to the full Intelligence Committees is the Terrorism Surveillance List established by the President. Thus, other members of the Senate or House or even members of their Intelligence Committees (other than those selected for their respective Subcommittees) would not be authorized to receive information about any aspect of the program or its implementation, including even the most egregious abuses. Moreover, this limitation on the information available to Congress is reinforced by draconian criminal penalties of imprisonment for up to 15 years, and fines of up to $1 million, for disclosure of any information about the surveillance programs to anyone not authorized to receive it. As a result only 14 members of Congress would have any information about these programs and they would be barred, on pain of severe criminal penalties, from sharing it with anyone else. This would effectively nullify any meaningful congressional oversight.

These penalties also would apply to and strongly deter any "whistleblowers" involved in surveillance activities who might wish to expose abuses of these broad surveillance powers. Thus, the bill would insure that any such abuses would be hidden from Congress and the public.

In sum, the bill's provisions for judicial review and oversight by Congress are essentially meaningless and make a travesty of the principles of separation of powers and checks and balances. They put the civil liberties of Americans – their right to communicate free of government intrusion – effectively at the unreviewable discretion of the President and his Attorney General.

S. 2453 – The "National Security Surveillance Act of 2006"

This bill, introduced by Senator Specter, would require the Attorney General to obtain FISA court orders approving "electronic surveillance programs." But by permitting the authorization of "programs," it would not require a showing of probable cause for electronic surveillance of particular, actual communications. The bill also would permit the FISA court to expand authorization of surveillance programs well beyond the current NSA program described by Attorney General Gonzales. Moreover, the bill would effectively require Congress to abdicate its responsibility for establishing standards that strike an appropriate balance between the needs of national security and civil liberties. Instead, the bill would delegate that law-making power to the FISA court,

which alone would determine what departures from FISA's current requirements are constitutionally permissible, in secret proceedings in which only the Attorney General would be heard. For these and other reasons discussed below, the Association also strongly opposes this bill.

Expanded Authorization for Surveillance

The bill would authorize "electronic surveillance programs" approved by the FISA court, for a period of 90 days, which could be extended through further applications to the FISA court.

"Electronic surveillance program" is defined to include surveillance of the substance of electronic communications of any kind (1) to gather foreign intelligence or "to protect against international terrorism," (2) sent or received by a foreign power or agent of a foreign power that is seeking to commit an act of international terrorism or by "persons who have had communication with a foreign power that is seeking to commit an act of international terrorism," (3) where it is not feasible to identify every person or location subject to surveillance and (4) where effective gathering of foreign intelligence requires the flexibility to begin surveillance immediately and requires an extended period of surveillance.

This definition could encompass communications entirely within the United States. It also would subject to surveillance communications where one party was merely a person who at some time had communications with a foreign power that is seeking to commit an act of international terrorism. Taken literally this would include persons who themselves did not seek to engage in such conduct themselves, but who merely had prior communications with a foreign power that did – whether or not known to the person communicating with the foreign power. This would greatly expand authorized surveillance to include communications entirely between two innocent American citizens, one of whom communicated with a foreign power, not knowing of that power's nefarious intentions.

Delegation to FISA Court of Broad Power to Authorize
Departures from Current FISA Standards

The FISA court review would differ from current FISA review, in that the court would issue court orders for a *program* that could result in surveillance of individual communications without probable cause, so long as the FISA court was satisfied that there was probable cause to believe that each communication intercepted by the *program* would be a communication with a foreign power or its agent that is seeking to commit an act of international terrorism or persons who have had communications with a foreign power that is seeking to commit an act of international terrorism. The FISA court would not be required to determine whether there is probable cause for any actual communication that would be intercepted. Moreover, the standard proposed seems purely cosmetic: It is unclear what could constitute probable cause for a "belief" that each of the many potential communications likely to be surveilled under the program at some future date would meet the bill's requirements, when probable cause for actual,

individual communications is not required. In addition, the standard seems in conflict with the definition of the electronic surveillance programs covered by the bill to include circumstances "where it is not technically feasible to name every person or address every location to be subjected to electronic surveillance."

The FISA court would also have to determine whether approval of an application was "consistent with the duty of the [Court] to uphold the Constitution of the United States." Thus, under the bill, Congress would delegate the power to assure that electronic surveillance programs met constitutional requirements entirely to the FISA court, thus abdicating Congress' own responsibility to uphold the Constitution. Moreover, this determination would be made in secret proceedings, in which only the Attorney General could be heard. Review of the FISA court's determination by the FISA Court of Review would be available only where a program proposed by the Attorney General was rejected by the FISA court, and review would be available in the Supreme Court, only where that rejection was affirmed by the FISA Court of Review; there would be no review of decisions approving surveillance programs. Moreover, review proceedings would be ex parte, with no adversary to advocate the public's interest in the preservation of civil liberties.

Finally, for applications for renewal of programs that have previously been approved for at least 3 successive 90-day periods, the FISA court also would be asked to "determine whether an evaluation of the implementation of the electronic surveillance program supports approval of the application." The FISA court would be directed to do so under a series of broad standards, without any guidance as to how these standards should be quantitatively or qualitatively applied or weighed. This would ask the Court to make policy judgments that, again, should be made by Congress, and which seem beyond the Court's competence, especially since it would have to rely entirely on information and arguments made by the government, with no adversarial input reflecting concerns about the program's impact on civil liberties.

In sum, the constitutionality of proposed surveillance programs, and whether experience with their implementation justifies their continuation, is left entirely to secret court proceedings, in which only the Attorney General is heard, and from which Congress and the public are excluded.

Timing of Applications

The government would have to seek FISA court approval for the current NSA program within 15 days of the enactment of the proposed law. But it would have 120 days to seek approval of other electronic surveillance programs in effect on the date of enactment of the proposed law. This last provision seems to provide the government with excessive latitude to engage in such programs before seeking judicial approval.

Authority in Emergencies or Following Declarations of War

The bill also would expand the time that the government could conduct surveillance without a court order in an emergency from 72 hours to 7 days and following a declaration of war by Congress from 15 days to 45 days. These extensions seem excessive, especially given the expansion of authority to conduct electronic surveillance proposed by the bill.

Congressional Oversight

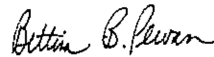
The bill requires that information about the implementation and operation of the programs be provided to both the Senate and House Intelligence Committees, but allows delegation of this function to subcommittees of those committees. The bill does not address the problem of how abuses reflected in classified information could be communicated to others in Congress so that needed reforms could be considered.

In sum, Senator Specter's bill while reflecting the desirable goal of providing court review, does not provide for adequate court review that would prevent surveillance of communications between innocent American citizens without probable cause and would delegate to the FISA court, judgments that should be made by Congress, after proper investigation of the facts.

* * *

For the reasons described above, the Association urges that S. 2453 and S. 2455 be rejected, and that Congress instead exercise its responsibilities to investigate the pertinent facts to determine how best to respond to the current unauthorized NSA surveillance program and any other unauthorized surveillance, and whether and how FISA should be amended, if at all.

Sincerely,



Bettina B. Plevan

cc: Senator Charles Schumer
Senator Hillary Clinton
Members of Senate Select Intelligence Committee
Members of Senate Judiciary Committee