

BARRY M. KAMINS PRESIDENT Phone: (212) 382-6700 Fax: (212) 768-8116 bkamins@nycbar.org

June 30, 2006

The Honorable Arlen Specter Chairman U.S. Senate Committee on the Judiciary 711 Hart Senate Office Building Washington, D.C. 20510 Fax: 202-228-1229

Re: Electronic Surveillance Legislation - S. 2453

Dear Senator Specter:

I write on behalf of The Association of the Bar of the City of New York to express our deep distress about the substitute version of S. 2453, which we understand may be the subject of your discussions with the White House concerning the regulation of electronic surveillance.

We strongly urge, as we did in our letter of April 18, 2006 commenting on the original version of S. 2453, that no legislation be considered until Congress receives full information about the Administration's secret surveillance programs. These now are known to include not only the NSA warrantless surveillance program discussed before your Committee in February by Attorney General Gonzales, but the creation of a massive database of call-detail information with the assistance of private communications companies and the collection of data on the financial transactions of millions of Americans. Until Congress fully understands the scope of these and possibly other surveillance activities, it is in no position to protect American citizens from what appears to be a massive intrusion on privacy being carried on by the Administration without accountability and without the checks and balances of Congressional oversight or judicial review.

The substitute version of S. 2453 certainly is not a satisfactory approach to these problems. We share each of the concerns reflected in the May 23, 2006 letter from the American Bar Association to you and Senator Leahy regarding the

2

May 11 substitute version of this bill. The bill continues to authorize approval of "programs" rather than specific, individual surveillance activities, thus appearing to authorize a type of general warrant which the Fourth Amendment was specifically intended to prohibit. But this bill is even more disturbing than the original version of S. 2453 that we criticized in our April 18 letter.

The substitute bill appears to no longer require the Administration to bear the burden of seeking authorization from the FISA court even for "programs," but seems to leave it to individual plaintiffs to challenge the programs, if they can obtain standing notwithstanding the secrecy of the program. Moreover, the bill would transfer any such challenges from federal district courts to the FISA court, where the lawfulness of these programs would be adjudicated in secret, thus undermining public confidence in the legality of these programs and denying the public crucial information about the conduct of elected officials.

Title VIII of the bill would effectively deprive the legislation of any meaning. It eliminates FISA's exclusivity, states that "nothing in this Act shall be construed to limit the constitutional authority of the President" to conduct surveillance and exempts surveillance conducted under the President's constitutional authority. As a practical matter, this would allow the President to ignore FISA altogether, as he has done until now in reliance on his alleged "inherent authority."

These provisions are inconsistent with our constitutional system of separation of powers and checks and balances. Whether the President has inherent authority to conduct foreign intelligence surveillance in the absence of Congressional action is irrelevant, given Congress' unquestioned powers under Article I to regulate such surveillance activities to protect undue invasions of the civil liberties of American citizens. Congress exercised these powers in enacting FISA. In these circumstances, any inherent power the President has is subject to Congress' regulatory power; unless it can be shown that the President's power is "beyond control by Congress." Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 640 (Jackson J. concurring).

That certainly cannot be shown here, where civil liberties are at stake. As Justice O'Connor observed: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." Hamdi v. Rumsfeld, 542, U.S. 507, 536 (2004) (plurality opinion.) See also Mistretta v. United States, 488 U.S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.") The substitute bill by recognizing an exception for the exercise of the President's inherent authority effectively negates Congress' power to regulate.

Finally, if this were not enough, the substitute bill makes its provisions retroactive, thereby ratifying what we submit are years of patent violations of law

Some amendments have been made to the May 11 version, but they do not change the substance of the bill or allay the concerns expressed here.

by the Executive branch. It is the very essence of our constitutional democracy and the rule of law, that no one - - including the President -- is above the law. Even without this provision, the bill amounts to a rejection of that fundamental principle.

We recognize the difficulties you have faced in attempting to obtain information and cooperation from the Administration. We also appreciate your efforts to question the Executive Branch's assertions of unchecked authority in the wake of September 11. But this bill, or anything like it, is not the answer. It is a complete surrender of Congress' and the judiciary's role in our constitutional scheme of separation of powers and checks and balances.

We therefore hope that you will reject this approach and instead urge that the Administration cooperate in providing information about its surveillance activities so that Congress can make adjustments to FISA, if necessary to further protect national security, but without compromising civil liberties or abandoning the role of Congress and the courts in assuring compliance with the Constitution and the law.

Sincerely,

Barry M. Kamins

Bany M. Kamins