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The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20510

Dear Speaker Pelosi:

I write on behalf of the Association of the Bar of the City of New York ("the Association") to express the Association's views on two pending bills that would replace the Protect America Act hastily passed by Congress in August. Both the proposed RESTORE Act, H.R. 3773, introduced by Chairman John Conyers, Jr. of the Judiciary Committee and Chairman Silvestre Reyes of the Committee on Intelligence, and the proposed Foreign Intelligence Surveillance Modernization Act of 2007, H.R. 3782, introduced by Congressman Rush Holt, would restore to American citizens and residents at least some of the vital constitutionally-based protections against warrantless electronic surveillance previously mandated by the Foreign Intelligence Surveillance Act ("FISA").[1] Both bills would be a significant improvement over the inadequate protections against improper electronic surveillance temporarily adopted in the Protect America Act.

As discussed below, the Association believes that the Modernization Act is the better bill because it clarifies that FISA does not apply to "foreign-to-foreign" communications that happen to be routed through the United States – the principal rationale upon which the Administration has relied in seeking revisions of FISA – but is otherwise careful to protect the communications of U.S. persons against warrantless interception. Unlike the RESTORE Act, the Modernization Act requires an individualized FISA warrant to be obtained before the international communications of American citizens and residents could be intercepted, and would not authorize blanket advance approvals from the FISA Court for the surveillance of communications of people overseas that might include communications with persons inside the United States. The Administration has made no case for such blanket authorizations.

[1] This letter is a revised version of my letter on behalf of the Association dated October 15, 2007, which makes a minor factual correction and takes into account the amendments of the RESTORE Act agreed upon in committee mark-up last week, as reflected in the "Amendment in the Nature of a Substitute to H.R. 3773" prepared by the House Intelligence and Judiciary Committees, in the form available on October 15, 2007.

Nor has the Administration explained why the ordinary requirements of the FISA statute are not adequate to permit surveillance of the international communications of American citizens and residents, when necessary, and such blanket authority to engage in warrantless surveillance raises serious constitutional questions.

Nevertheless, the proposed RESTORE Act would go a long way towards correcting the deficiencies of the Protect America Act, and represents a compromise that the Association could accept. The RESTORE Act would give the Administration the power it has requested to intercept foreign-to-foreign communications without the obligation to obtain a warrant from the FISA Court, but it would do so in a way that is far more protective of the constitutional rights of American citizens and residents than the Protect America Act. The Protect America Act authorized the Attorney General and the Director of National Intelligence to intercept, without a FISA Court order, any communications "concerning" persons "reasonably believed" to be outside the United States, 50 U.S.C. § 1805b, as long as the Government was seeking foreign intelligence information. This authority was not limited to communications between persons outside the United States, and could be read to permit interception of communications entirely within the United States without warrants, a grant of authority that the Association believes to be plainly unconstitutional. Moreover, the Protect America Act granted the Attorney General and the Director of National Intelligence the power to authorize such interceptions on their own say-so, with no prior FISA Court review and with deferential after-the-fact judicial review, limited to the question whether the Government's determination that its procedures were reasonably designed to prevent improper interceptions of American citizens was "clearly erroneous," 50 U.S.C. 1805c. There is no basis for this extraordinary grant of virtually unreviewable authority to the Administration to carry out electronic surveillance potentially impacting U.S. persons. The Administration, to this day, has never made a cogent case that the procedures established under FISA impose unreasonable obstacles to electronic surveillance appropriate in the public interest.

While the Administration has provided no information to justify the RESTORE Act's provisions authorizing the Government to obtain blanket advance approvals from the FISA Court rather than individualized warrants – and the Association believes that such blanket authorizations fail to give adequate protection to legitimate privacy interests and raise serious constitutional questions to the extent they authorize warrantless interception of the international communications of American citizens and residents – the RESTORE Act would do a far better job than the Protect America Act of imposing appropriate limitations on the scope of the Administration's authority to conduct such electronic surveillance without an individualized court order.

*First*, the RESTORE Act would clarify that the surveillance authority it grants would only permit the interception of communications "of persons that are reasonably believed to be located outside the United States and not United States persons" (proposed Section 105B(a)), thus making clear that the Act does not permit warrantless electronic surveillance within the United States simply because it might "concern" people outside the United States.

*Second*, the RESTORE Act would return to the FISA Court a more meaningful role in reviewing applications to conduct electronic surveillance for purposes of gathering foreign intelligence. The Act would require the Administration to seek authority to engage in such foreign surveillance from the FISA Court in advance (apart from narrowly confined emergency situations), and require FISA Court approval of the procedures employed by the Administration in determining that targets are overseas; the information sought; the minimization procedures the Administration will follow; and the procedures the Administration will follow to ensure that individualized warrants are obtained under the FISA statute when surveillance of a person

inside the United States is required (proposed Section 105(b)(2)). These are all important checks on the Executive's exercise of the authority granted by the Act, and necessary to ensure that the authority granted is not abused.

*Third*, the RESTORE Act would require intensive oversight of the Administration's use of the power to obtain blanket authorization from the FISA Court for foreign electronic surveillance, oversight that is entirely missing under the Protect America Act. The RESTORE Act would require applications for blanket surveillance orders to be submitted promptly to Congress (proposed Section 105D(a)); regular audits of the use of this authority by the Justice Department's Inspector General (proposed Section 105D(b)); and regular reports to Congress from the Attorney General and Director of National Intelligence (proposed Section 105D(c), (d)) and 105D(d)).

The RESTORE Act also contains several other important provisions to protect the rights of U.S. citizens and residents. The Act would once more emphasize that the FISA statute furnishes the sole statutory authority for the Administration to engage in electronic surveillance for purposes of gathering foreign intelligence (Section 8 of the substitute bill), thus repudiating the Administration's baseless claim that the "Authorization for the Use of Military Force" adopted on September 18, 2001 provided supplemental statutory authority to engage in foreign intelligence gathering activities relating to terrorism.

The RESTORE Act would also require the Administration to make a full accounting to Congress of all its electronic surveillance activities since September 11, 2001 (Section 10 of the substitute bill), including potentially unlawful surveillance activities that the Administration has heretofore fought aggressively to keep secret from the American public and to avoid any judicial review.

Finally, the RESTORE Act would provide that the authority granted to the Administration to obtain blanket approval of warrantless foreign surveillance would expire in two years, on December 31, 2009 (Section 17(a) of the substitute bill). This limitation ensures that Congress will have another opportunity, in the relatively near future, to reevaluate the necessity for the extraordinary authority granted by the Act and to consider again an approach more sensitive to protection of Americans' legitimate and constitutionally-protected privacy rights in light of the information obtained and experience gained under the RESTORE Act.

In light of these positive aspects of the RESTORE Act, the Association would accept House approval of the RESTORE Act as a compromise measure. That said, however, the Association believes that the FISA Modernization Act proposed by Congressman Holt provides more complete protection to Americans' constitutional rights, and would be a preferable bill. Unlike the RESTORE Act, the proposed Modernization Act would exclude from the scope of the FISA statute <u>only</u> communications "transmitted exclusively between or among persons reasonably believed to be located outside the United States and not known to be United State persons" (proposed Section 302), and would not provide any authority for "blanket" FISA Court authorization of warrantless electronic surveillance. The Modernization Act would thus appropriately limit revision of the FISA statute to the Administration's oft-stated rationale, the need to exclude foreign-to-foreign communications which happen to get routed electronically through the United States. In so doing, however, the Modernization Act would also make clear that the usual requirements of the FISA statute – including the requirement of an individualized FISA warrant before the interception of electronic communications – apply to communications between a citizen or resident in the United States and an individual overseas.

The Association believes that Americans have a reasonable expectation of privacy in the telephone calls they make and the electronic messages they send to friends and colleagues

overseas, and that these legitimate privacy interests should be protected as a matter of sound policy to the greatest degree possible consistent with the legitimate demands of national security. Moreover, electronic surveillance of such communications without an individualized warrant raises serious constitutional questions.

The Administration has never made any showing that compliance with the standard procedures specified in the FISA statute to authorize the interception of such international communications would interfere with intelligence-gathering activities legitimately employed to keep the Nation safe from terrorism. The Administration has shown no reason why the Government could not satisfy the FISA warrant requirement in appropriate circumstances, and the FISA statute has long given the Government the authority to take emergency action when truly required, subject to obtaining FISA Court ratification of its actions within 72 hours. The proposed Modernization Act would indeed expand this authority, permitting the Government up to a week before it is required to obtain FISA Court authorization (proposed Section 201), and provides a much more acceptable balance between the Government's legitimate intelligence gathering needs and the privacy rights of American citizens and residents.

Before closing, I should address two other matters that are not currently part of either the RESTORE Act or the Modernization Act, but may well be brought to the floor of the House through proposed amendments. Obviously, in light of the analysis set out in this letter, the Association strongly opposes any effort to permanently authorize or extend the life of the Protect America Act. As stated above, the Protect America Act provides woefully inadequate protection for Americans' constitutional rights; it improperly vests the Administration with broad and largely unreviewable authority to engage in warrantless surveillance that threatens Americans' right to privacy, without any showing of real necessity; and it eliminates all effective judicial review of the Administration's foreign intelligence surveillance, as previously provided by the FISA Court.

Finally, the Association also strongly opposes any effort to give immunity from liability to telecommunications companies that have allegedly cooperated in the past with the Administration's unauthorized and probably unlawful warrantless surveillance program. There is simply no lawful basis for the Administration's demand for such absolute immunity. It would encourage a culture of impunity for unlawful conduct that is entirely unacceptable, undermine the rule of law, and seriously erode incentives for future compliance with the law. There is no unfairness in permitting lawsuits against the telecommunications companies to go forward, because these companies have always had a safety-valve to escape liability if asked to cooperate with a government surveillance program. Under 18 U.S.C. §2511(2)(a)(ii), the telecommunications companies were already entitled to immunity from suit as long as they received either a court order directing them to provide assistance or obtained a certification by the Attorney General or his designee "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required." Id. Given the pre-existing availability of this carefully tailored immunity provision, the grant of amnesty now would reward only manifest failures to abide by the law. Any telecommunications company that failed to observe this express and unequivocal legal requirement, and failed to seek assurance that its conduct was legal over the years during which the surveillance allegedly occurred, has no legitimate cause for complaint, and should be held accountable for its unlawful conduct.

Sincerely,

Barry Kamins

cc: Hon. John A. Boehner

Hon. John Conyers, Jr.
Hon. Lamar S. Smith

Hon. Silvestre Reyes
Hon. Peter Hoekstra

Hon Rush Holt

NY Congressional Delegation
NJ Congressional Delegation