The Association of the Bar of the City of New York

Office of the President

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June 3, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
109 Hart Senate Office Building
Washington, District of Columbia 20510

The Honorable John D. Rockefeller IV
Vice Chairman
Senate Select Committee on Intelligence
531 Hart Senate Office Building
Washington, District of Columbia 20510

Re: Hearings on Patriot Act Reauthorization and Revision

Dear Senators Roberts and Rockefeller:

I write on behalf of The Association of the Bar of the City of New York. The Association is a professional association of over 22,000 attorneys 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. Through its standing committees, including those on Civil Rights, Immigration Law, Federal Legislation and International Human Rights, the Association has long had an interest in the need to balance the fundamental interests of civil liberties and individual freedom with the needs of national security and to assure that concerns for national security do not unnecessarily or unduly

undermine guarantees of civil liberties that are the hallmark of our constitutional democracy and a beacon to the world.

The Association is writing to express its grave concerns about the Committee's decision to hold hearings closed to the public on a bill to reauthorize and expand provisions of P.L. 107-56, the law known as the PATRIOT Act. The interests implicated by the PATRIOT Act and by its modification and possible expansion are of vital concern to the American people as they affect the very core of our nation's commitment to individual freedoms and civil liberties. The very decision to hold hearings on these matters in secret and without public scrutiny is itself a severe blow to fundamental democratic values.

While the Association is concerned about a number of the provisions in the current PATRIOT Act and the proposed revisions you are considering, we single out one proposed provision which the Association vigorously opposes to illustrate the intense need for public involvement and oversight of the legislative process pertaining to these matters: Section 213 of the proposed bill you are considering entitled "Administrative Subpoenas in National Security Investigations."

The proposed Section 213 would expand the powers granted under the current Section 215 of the PATRIOT Act by enabling the Federal Bureau of Investigation to issue administrative subpoenas requiring "the production of any records or other materials that are relevant to an authorized investigation… to protect against international terrorism or clandestine intelligence activities." This proposal would effectively

eliminate the current requirement that orders under Section 215 requiring production of such records only be issued through application to a judge of the Foreign Intelligence Surveillance Act court ("FISA court") or a specially designated U.S. magistrate. The effect of the proposed revision would be to give the FBI the power to issue such orders on its own initiative with no prior judicial supervision. The Association vigorously opposes this proposal because it has the potential for serious abuse and grave and unwarranted intrusions into rights guaranteed by the First and Fourth Amendments to the Constitution.

As you know, Section 215, as it now exists, is the subject of intense controversy and concern. It has the potential for unprecedented intrusions into individual privacy, for example, by authorizing the production of library records and prevents public scrutiny of any abuses because it prohibits recipients of 215 orders from disclosing their existence. The Association submits that the proposed expansion of Section 215 -- permitting the FBI to issue subpoenas requiring such production without prior judicial review – exacerbates these concerns and is wholly unnecessary. Any encroachment on civil liberties and individual privacy should be undertaken only where there is an overriding showing of need. While investigative powers are essential to effectively addressing the threat of terrorism, there has been no demonstration that the very limited judicial review required by Section 215 has hindered the government's ability to carry out intelligence investigations.

Given the extraordinary nature of the PATRIOT Act powers, and the fact that it was rapidly enacted in response to 9/11, now is the time that Congress should be

revisiting its provisions and carefully evaluating their necessity. In particular, consideration should be given to amending Section 215 in a manner that restores the checks and balances on the exercise of governmental authority that are central to our democracy. While the present bill would allow for very limited judicial review *after* the FBI subpoena has been issued through a challenge by its recipient, pre-issuance judicial review is particularly critical in the context of the broad records requests envisioned by the proposed Section 213. The current Section 215 forbids the recipient to disclose receipt of the subpoena and the proposed expansion also would permit the FBI to forbid disclosure by the recipient (with the exception of disclosing it to an attorney to obtain legal advice). As a result, persons whose records are held by a business or institution that has received a subpoena will be unaware that the subpoena was issued and thus will have no opportunity to challenge its validity. Instead, under the proposed bill, only the third party recipient of the subpoena will be empowered to raise such a challenge. Because these third-party recipients are immunized from liability for compliance with the subpoena, they will have little incentive to undertake the burden of challenging the subpoena to protect the interest of persons whose records are covered by the subpoena. Assuming that non-disclosure is warranted for a given investigation, it is imperative that the judiciary, entrusted with protecting the liberty interests of the public, provide a check on potential abuses of these investigative powers before the subpoena issues.

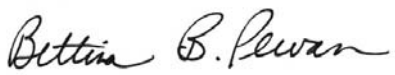
Similarly, because the imposition of a non-disclosure requirement affects both the First Amendment rights of subpoena recipients, and the Fourth Amendment rights of notice and challenge for persons whose records are covered by the subpoenas, the burden should be on the government to demonstrate to the court the need for non-disclosure in

each situation. Requiring the FBI to aver that non-disclosure is compelled by national security interests, with no judicial scrutiny of that averment, does not provide a satisfactory check on potential abuse.

The Association is aware that proponents of the present bill have asserted that granting administrative subpoena power in the context of anti-terrorism efforts is no different from the powers already used in areas, such as some criminal investigations, where the national interest is considerably weaker. We believe this comparison is inapposite. In these other contexts, subpoenas are used for clearly defined purposes and to obtain limited types of records. Under the proposed legislation, however, the subpoenas must only be related to "an investigation to protect against international terrorism." Such investigations can be far-reaching and can encompass legal, as well as illegal, activity. In the case of foreign nationals, such investigations can also be based solely upon the exercise of First Amendment rights. Moreover, administrative subpoenas issued in intelligence investigations can also apply to entire databases or files and need not pertain to the records of a particular subject. Hence, as long as the FBI merely determines in its own judgment, that records are relevant to an investigation to "protect against international terrorism" it could demand records of such activities as books checked out of libraries or attendance at meetings or conferences encompassing persons having nothing to do with any wrongful conduct. Another critical difference is that in the criminal context, notice is provided to the subject of the subpoena, typically at the time of its issuance, and the subject is afforded an opportunity to judicially challenge its validity. As discussed earlier, neither the PATRIOT Act nor the proposed bill would offer such notice and an opportunity to challenge the subpoena.

The administrative subpoena issue is only one of a number of serious issues raised by the proposed bill that affect the civil liberties and rights of all Americans. The Association, therefore, strongly urges that your committee hearings be opened to the public so that all can be made aware of the serious issues at stake. To the extent that legitimate security interests are affected by the Committee's deliberations, they should be accommodated in a manner that preserves an open democratic process to the greatest extent possible. Deliberating over these issues in secret only heightens the legitimate concerns of our citizenry over the encroachment of intelligence powers into individual privacy and civil liberties.

Sincerely,



Bettina B. Plevan

cc: The Honorable Hillary Clinton
476 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
313 Hart Senate Building
Washington, DC 20510