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September 14, 2006

The Honorable Bill Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

Re: Electronic surveillance--S.2453, 2455 and 3001 and H.R. 5825

Dear Majority Leader Frist and Minority Leader Reid:

I write on behalf of the Association of the Bar of the City of New York ("the Association") to urge you to oppose three bills that would substantially amend FISA by authorizing the President to conduct warrantless surveillance of U.S. citizens without any meaningful judicial oversight. The bills – S. 2453, S. 2455, and H.R. 5825 – would result in the elimination of the role of Congress and the courts and fundamentally undermine our system of separation of powers and checks and balances. All this is being done without any investigation into the details of the surveillance programs being conducted by the Administration, so that Congress is legislating completely in the dark. We view all three bills – S. 2453, S. 2455 and H.R. 5825 – as an abdication of Congress' constitutional responsibilities and as a major threat not only to civil liberties, but to our constitutional system of separation of powers and the rule of law.

The comments below are based on the latest versions of these bills available to us. S. 2453 and 2455 and a third bill the Association supports, S.

3001, have been reported out of the Senate Judiciary Committee; H.R. 5825 is pending as of this writing in the House Judiciary Committee. We understand that changes may have been, or will be, made to all or some of these bills, but because of the extraordinary haste with which this legislative process is moving we may not have the final versions of the bills. Nevertheless, we believe that the concerns raised in this letter will not be eliminated by any changes.

We do note the unseemly haste with which these bills are being pushed through committee to a floor vote, perhaps as early as the beginning of next week. Given the serious civil liberties issues at stake, a more thorough opportunity for consideration of these bills is essential. There is no emergency requiring such extraordinary haste, especially since the Administration has been pursuing its terrorist surveillance program for almost five years. It is imperative that Congress take the time to consider fully the nation's security needs and how they can be met without unduly infringing civil liberties. The flawed process being followed by Congress is itself another example of Congress' abdication of its responsibilities.

1. S. 2453

S. 2453, introduced by Senator Specter, has been described as a compromise to meet concerns expressed by the White House. In fact, it is a complete capitulation to the White House position that the President is entitled to unfettered authority to conduct electronic surveillance of American citizens.

First, nothing in the bill requires the Administration to seek judicial authorization of any electronic surveillance program. While the bill provides procedures for applications by the Executive to the FISA court for authorization of electronic surveillance programs, it does not require the Administration to use these procedures. We understand the President has promised to submit the NSA surveillance program (but no other program) to the FISA court, but nothing in the bill reflects that or requires him to do so. Instead, Title VIII of the bill eliminates the provisions of FISA making it the exclusive source of authority for conducting foreign intelligence electronic surveillance. At the same time, the bill purports to

confirm the President's alleged inherent constitutional authority to conduct such surveillance and permits the President to conduct surveillance authorized either under the statute or "under the Constitution." These provisions effectively render meaningless the provisions of the bill providing for judicial review.

Second, even if the Administration chose to seek authorization from the FISA court, the judicial review provided by the bill is completely inadequate. Such review is limited to authorization 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. And even then the court's actual review of the details of the programs, as distinct from rubber stamping the Attorney General's "certifications," is extremely limited. Moreover, the bill provides substantial exceptions permitting the conduct of surveillance without a warrant for an entire year, based on the unilateral, unreviewed determination of the Attorney General and narrows the definition of "electronic surveillance" that would be subject to FISA.

Third, the bill compels the transfer of all challenges to "the legality of classified communications intelligence activity relating to a foreign threat" from federal courts to the FISA court, solely on the basis of the Attorney General's affirmation that federal court proceedings would harm national security. Inasmuch as the Administration has already invoked the state secrets privilege in each of the pending federal court challenges to the NSA surveillance program, this would mean the transfer of all those cases to the FISA court.[1] Thus, as a practical matter, all challenges to the legality of the Administration's surveillance programs, including their constitutionality, would be adjudicated in secret proceedings before the FISA court, thus denying the American people any information about the programs the Administration is implementing, the claims it is making to justify them, the basis on which the programs may be upheld and other essential information about the conduct of its government.

[1] The transfer would include cases in which the federal courts have already rejected the government's state secrets claim, as well as the appeal pending in the Sixth Circuit from the Detroit federal district court decision holding the NSA program unlawful, and the Manhattan federal district court case that has been briefed and argued and is now sub judice.

Moreover, should the FISA court dismiss the adversarial challenges transferred from federal courts on non-substantive grounds,[2] such as lack of standing, adjudications of the legality of the programs could be made only if the Administration chose to seek FISA court authorization. In that event, the legality and constitutionality of the programs would be adjudicated in secret, ex parte proceedings in which no one would be present to advocate the public's interest in civil liberties, where the Attorney General alone would be heard, and where only the Attorney General would have a right to appeal should authorization be denied. Decisions authorizing programs and upholding their constitutionality would never be disclosed to the public or reviewable on appeal or by certiorari to the Supreme Court. Such extraordinary proceedings for determining the legality and constitutionality of Executive conduct fail to meet the most basic requirements of due process and the rule of law and would raise serious doubts as to whether they are a lawful exercise of the judicial power conferred by Article III of the Constitution.

2. S. 2455

This bill, introduced by Senator DeWine, effectively authorizes wide-ranging surveillance of U.S. citizens for indefinite periods without any prior judicial review, at the discretion of the President and the Attorney General. While the bill appears to provide for judicial review, the decision of whether to seek such review is left entirely to the discretion of the Attorney General. The President is given authority that would enable him to greatly expand the scope of communications subject to surveillance without court order, even beyond those to which the NSA surveillance program is supposedly targeted. Finally, the bill renders congressional oversight effectively meaningless, by limiting reports about the programs to subcommittees of the Senate and House Intelligence Committees and by imposing draconian penalties that prevent disclosure even to other members of the Intelligence Committee.

[2] It is not clear if these FISA court proceedings will be truly adversarial, as nothing in the bill indicates whether plaintiffs and their counsel would have access to classified information. And the version of the bill we have makes no provision for appeals by plaintiffs.

3. H.R. 5825

This bill, introduced by Representative Heather Wilson, gives the President authority to conduct electronic surveillance "after a terrorist attack" without a court order for an initial period of 45 days, which is then renewable at the President's discretion indefinitely, subject only to certain requirements for reports to the House and Senate Intelligence Committees and the FISA court. Neither the FISA court nor Congress is given any power to reject or modify these programs. The term "after a terrorist attack" is not defined. The bill does not make clear how recent the attack must have been or whether it includes attacks on U.S. interests or personnel outside the U.S. such as those in Iraq. Since all of the President's surveillance programs were instituted after September 11, 2001, the bill might be read to impose no restrictions whatsoever on the President's authority to conduct warrantless surveillance.

We understand that the White House is seeking to expand these broad powers for warrantless surveillance to circumstances where a terrorist attack is "imminent." But even as currently drafted the powers conferred on the President are overly broad and unnecessary. It would allow a terrorist attack to be the basis for abandoning the rule of law and depriving American citizens of their liberties.

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The Association therefore urges you in the strongest terms to vote to reject these three bills the enactment of which would subvert our constitutional democracy.

We would urge instead that you support Senator Feinstein's bill, S. 3001, which was also approved by the Senate Judiciary Committee. That bill reconfirms FISA as the exclusive means for conducting foreign intelligence surveillance. This bill also amends FISA to make its existing procedures more efficient, for example, by providing more personnel to make, and more FISA court judges to review, applications for surveillance, fixing time limits for decisions on applications, providing funds for training Department of Justice (DOJ) and FBI personnel on FISA procedures, and authorizing delegations of authority within the DOJ and FBI. It also provides the Administration with greater flexibility in emergency situations, extending the time in which

surveillance in such emergencies can be conducted before seeking an order from 72 hours to 168 hours. Until Congress exercises it constitutional responsibilities and conducts a full investigation of the Administration's surveillance programs, however, it has no basis for making more substantial amendments to FISA. Only after Congress has complete information concerning these programs can it determine what changes, if any, are needed to meet national security needs and what provisions are required that would prevent undue encroachments on civil liberties.

Sincerely,

Barry Kamins

CC: Senator Arlen Specter
Senator Patrick Leahy
Senator Charles Schumer
Senator Hillary Clinton
Senator Robert Menendez
Senator Frank Lautenberg
Senator Joseph Lieberman
Senator Christopher Dodd
Senator Dianne Fienstein
Senator Carl Levin
Senator Pat Roberts